

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EUCLIDES SOTO, et al
Plaintiffs,

vs.

SHERMAN-FEINBERG
CORPORATION, et al

Defendants.

*
*
*
*
*
*
*

CIVIL ACTION
No. 04-10892-JLT

BEFORE THE HONOR-ABLE JOSEPH L. TAURO
UNITED STATES DISTRICT JUDGE
FINAL PRETRIAL CONFERENCE

A P P E A R A N C E S

LAW OFFICE OF ROBERT O. BERGER, 11I
11 Beacon Street, Suite 1210
Boston, Massachusetts 02108
for the plaintiffs
By: Robert O. Berger, 11I, Esq.

LAW OFFICE OF JOHN LEE DIAZ
801A Tremont Street
Boston, Massachusetts 02108
for the plaintiffs
By: John Lee Diaz, Esq.

Courtroom No. 20
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
March 2, 2006
10:25 a.m.

1 APPEARANCES, CONTINUED

2
3
4 PYLE, ROME, LICHTEN, EHRENBURG & LISS-RIORDAN, P.C.
5 18 Tremont Street, Suite 500
6 Boston, Massachusetts 02108
7 for the defendants
8 By: Harold L. Lichten, Esq.

9
10 DUANE MORRIS LLP
11 470 Atlantic Avenue, Suite 500
12 Boston, Massachusetts 02110-2600
13 for the defendants
14 By: Matthew R. Roberts, Esq.

15
16
17
18
19
20
21
22 CAROL LYNN SCOTT, CSR, R-MR
23 Official Court Reporter
24 One Courthouse Way, Suite 7204
25 Boston, Massachusetts 02210
 (617) 330-1377

1 PROCEEDINGS

2 **THE CLERK:** Civil Action No. 04-10892,
3 Euclides Soto versus Sherman-Feinberg. Counsel please come
4 forward and identify themselves for the record.

5 (Whereupon, the Court and the Clerk conferred.)

6 **THE COURT:** Sit down. Let me catch up with
7 you.

8 (Pause in proceedings.)

9 **THE COURT:** Let me start off by saying I am
10 going to deny the motion to attach and allow the motion to
11 strike the request for attachment. I also am going to deny
12 the motion to appoint a translator. This is a civil case.
13 As I understand it, you have to pay for your own translator.

14 **MR. BERGER:** Your Honor, with respect to the
15 translator, we will be paying for it. But the question is
16 the Court has to help us select the translator as I
17 understand it. And I understand Zita has a number of --

18 **THE COURT:** Well, if we can accommodate you,
19 we certainly will. You can take care of that, Zita?

20 **THE CLERK:** Yes, Judge.

21 **THE COURT:** Okay. So we will deny the motion
22 to appoint one but we certainly will do what we can to
23 facilitate the appointment.

24 So those two motions are denied: Motion to appoint
25 a translator and a motion to appoint one at the cost of the

1 government.

2 Now, are you going to just have one translator that
3 all the parties are going to share; is that it?

4 **MR. DIAZ:** Yes, Your Honor.

5 **THE COURT:** I hear the front table saying yes.
6 What about the back table?

7 **MR. LICHTEN:** We have no objection to that,
8 Your Honor.

9 **THE COURT:** So you are going to pay for half,
10 you are going to pay for whatever the cost is?

11 **MR. LICHTEN:** We are not seeking appointment
12 of a translator so -- yes, we will pay for half. That's
13 fine, Your Honor. That's fine.

14 **THE COURT:** Otherwise, are you going not to
15 listen to the translator --

16 **MR. LICHTEN:** I understand the point. If we
17 cross-examine, we want to get -- I understand so we will pay
18 for half.

19 **THE COURT:** So whatever the bill is, it will
20 be split fifty/fifty and that will be split between the
21 plaintiffs and the defendants.

22 **MR. DIAZ:** Yes, Your Honor.

23 **MR. LICHTEN:** Your Honor, there is another
24 party that is here today, the attorney for Farnsworth Fibre
25 is here so half and half (indicating). There is a third

1 party in this case. He is present. .They are represented
2 here today.

3 **THE COURT:** So how do you want to handle it?
4 Do you think that I can leave it up to you people to see
5 whether you split it three ways or two ways and you divide
6 your two ways any way you want?

7 **MR. LICHTEN:** Absolutely.

8 **THE COURT:** All right.

9 **THE CLERK:** Would you identify yourself for
10 the record?

11 **MR. ROBERTS:** Matthew Roberts, for Farnsworth
12 Fibre Corporation.

13 **THE COURT:** You understand you are going to
14 participate in the payment of this fee for the translator?

15 **MR. ROBERTS:** I understand I'm going to speak
16 to counsel to work that out, yes, Your Honor.

17 **THE COURT:** Okay.

18 (Pause in proceedings.)

19 **THE COURT:** I am going to deny without
20 prejudice the union defendant's claim that punitive damages
21 are unavailable in this case, either on the fair
22 representation claim or the other theory. When I say
23 "without prejudice," without prejudice to it being raised at
24 the conclusion of the plaintiffs' case.

25 In other words, it may be that the defendants will

1 have a motion for a directed verdict. If I don't think the
2 evidence in its totality warrants submission to the jury of
3 any issue on emotional distress, then I am not going to -- I
4 will direct the verdict.

5 Now, having said that, do you want to be heard on
6 that?

7 **MR. LICHTEN:** Very briefly, from the
8 defendants' point of view, Your Honor, because of the
9 Supreme Court's decision in the Foust case which holds
10 squarely -- and I don't think it's subject to dispute --
11 that punitive damages simply are unavailable to a plaintiff
12 in a DFR claim, I would respectfully disagree with the
13 Court's --

14 **THE COURT:** Yes, I will allow it with respect
15 to -- you are right. As far as your duty of fair
16 representation, that is what you are saying to me?

17 **MR. LICHTEN:** Yes, that's correct.

18 **THE COURT:** But I am going to deny without
19 prejudice the motion to the extent that the union seeks to
20 exclude emotional distress and front pay damages arising
21 from the union defendant's actions, that we will reserve
22 until after the conclusion of the plaintiffs' evidence and
23 see whether or not it all adds up to something that ought to
24 go to the jury.

25 **MR. LICHTEN:** Thank you.

1 **THE COURT:** Okay.

2 In other words, we will see if there is evidence of
3 extreme misconduct as an example. If there is not, then
4 under First Circuit law the -- do you want to be heard
5 further? I mean, as I understand, you can't -- the claim
6 for extreme misconduct can't be anything that really arises
7 from the employer's decision to shut down the plant. Where
8 is the evidence of extreme misconduct that is going to be
9 here in this case?

10 **MR. BERGER:** Your Honor, there were various
11 fires that they were aware of, smashed cans. They knew that
12 the fires were burning at the time that they were in the
13 plant in November 2003.

14 There was extreme misconduct in connection with a
15 wide variety of failures to follow-up with the union
16 membership, inviting them to meetings, failing to post
17 notices, no bulletin board and those kinds of items.

18 Your Honor, the --

19 **THE COURT:** But those are allegations of the
20 employer misconduct, aren't they, as opposed to any action
21 taken by the union itself to harm --

22 **MR. BERGER:** Well, the union in our position
23 was on notice about those things. And under the standards
24 that were set forth by the Kolstad versus American Dental
25 Association, those would be covered under Title VII. And

1 all that needs to be shown under Kolstad, which was a
2 departure, is that there was acting with malice or reckless
3 or careless indifference to their rights --

4 **THE COURT:** All right. So we will face that
5 issue again at the conclusion of the plaintiffs' case. So I
6 am going to deny the motion without prejudice as I indicated
7 that I will.

8 **MR. BERGER:** Thank you, Your Honor.

9 Your Honor, can I just query the record on one
10 thing? On the motion for the attachment, I believe --

11 **THE COURT:** Can you wait just one second?

12 **MR. BERGER:** Sure.

13 **THE COURT:** I will listen to you. I just want
14 to finish reading what I am reading.

15 (Pause in proceedings.)

16 **THE COURT:** What is the story on the motion to
17 exclude evidence occurring beyond the statute of
18 limitations?

19 **MR. BERGER:** That's very clearly resolved by
20 the U.S. Supreme Court, Your Honor. Let me read you the
21 specific language --

22 **THE COURT:** But the defendants haven't opposed
23 this motion?

24 **MR. BERGER:** Yes, they did, Your Honor.

25 **THE COURT:** Okay. Then I missed it. Go

1 ahead.

2 **MR. BERGER:** The National Railroad versus
3 Morgan, 536 U.S. 101, Page 118, the Supreme Court
4 specifically said, Nor does the statute of limitations bar
5 an employee from using the prior acts as background evidence
6 in support of a timely claim.

7 They specifically dealt with the problem. And
8 that --

9 **THE COURT:** What do you say about that?

10 **MR. LICHTEN:** Your Honor, National Railroad
11 versus Morgan -- I haven't seen their document -- has
12 nothing to do with the DFR claim. That's a discrimination
13 claim.

14 Your question related to the DFR claim. There is
15 no tolling exception known to law to the DelCostello
16 decision in the U.S. Supreme Court that says any acts
17 occurring before six months filing in federal court is time
18 barred.

19 The case that he's referring to is a case involving
20 discrimination under Title VII. With respect to that issue,
21 Your Honor, it doesn't relate to the DFR claim.

22 **MR. BERGER:** He's right on that. The DFR,
23 there is a window. And we are seriously contemplating
24 dropping the whole DFR scenario to simplify -- John and I
25 reached each other last night to talk about that -- and make

1 this -- where we are now -- and this is one of the things I
2 wanted to tell you about.

3 Where we are now is I think that the case is going
4 to be strictly discrimination law and strictly 151(b), drop
5 the DFR. That gets the employer out without any worries.
6 We don't have to think about that one.

7 And it will simplify -- and then we don't have what
8 would be very confusing to the jury, two windows on the
9 statute of limitations, three hundred days and one hundred
10 eighty days. I don't know how they're not going to get
11 confused with that.

12 **THE COURT:** Well, let me ask you this: Does
13 it make sense for you to recast your complaint then?

14 **MR. BERGER:** Well, you know, that's -- what I
15 am trying to say then is that I'm willing at this point to
16 waive the DFR.

17 **THE COURT:** No, I understand that, and that
18 would be helpful. Do you think that what we ought to do is
19 to work from a new piece of paper?

20 **MR. BERGER:** Absolutely. I'd be glad to do
21 that.

22 **THE COURT:** You come up with an amended
23 complaint --

24 **MR. BERGER:** Absolutely.

25 **THE COURT:** -- of those claims that you are

1 pressing. The others we will deemed to have been waived
2 without prejudiced.

3 **MR. BERGER:** I think that would save a lot of
4 time.

5 And can I get back to the motion?

6 **THE COURT:** Wait a minute.

7 Do you agree with that?

8 **MR. LICETEN:** I have no problem with that. I
9 was going to further address your question about the prior
10 acts and the statute of limitations with respect to the
11 discrimination claim but I will wait until --

12 **THE COURT:** All right. Okay. So how much
13 time do you need to do that?

14 **MR. BERGER:** I can do that in a couple days,
15 Your Honor. Early next week, Tuesday.

16 **THE COURT:** All right. So let's say a week
17 from today.

18 **MR. BERGER:** That's fine.

19 (Pause in proceedings.)

20 **THE COURT:** Now, you want to be heard further
21 on the statute of limitations?

22 **MR. LICHTEN:** Yes. With respect to the
23 discrimination claim, the United States Supreme Court's
24 decision in Morgan is very important. What it says is with
25 respect to a harassment claim, which this is not, there you

1 can go back and use a continuing violation theory. You
2 cannot use a continuing violation theory on a discrimination
3 case, which this is.

4 They do that and say at the end, However, if you
5 have discrete acts of discrimination occurring outside the
6 statute of limitations, they're admissible to show
7 discriminatory conduct. They're not admissible for the
8 purpose of showing liability and establishing damages.

9 The law is very clear on that.

10 Now, in this case what --

11 **THE COURT:** Do you agree with that?

12 **MR. BERGER:** Yes, I agree with that. However,
13 I do want to say that state courts have taken the opposite
14 direction in Ocean Spray Cranberries, Inc. versus MCAD, 441
15 Mass. 632, 686 N.E., 2d 1303 (2004). So the 151(b) is the
16 opposite of that. They wholeheartedly endorse a continuing
17 violation theory.

18 So we've got a real divergence.

19 **MR. LICHTEN:** Well, I disagree with that
20 because I don't think the SJC has ever addressed directly --
21 they have held a continuing violation theory applies in
22 Cuddyer which is a harassment claim. And they have held it
23 applies in a retaliation claim. But they have never held
24 that it applies strictly in a discrimination claim.

25 So I think that's a, at the very least an open

1 question under state law. We think the state law tends to
2 preempt it in any event.

3 What I wanted to say though to go to the heart of
4 this matter though, it would be one thing if they wanted to
5 bring into evidence prior to the 300-day statute of
6 limitations evidence that the union official came down and
7 said I'm not going to deal with you people, you're all
8 Hispanic or something, if it was a discrete act of
9 discrimination, or we're not going to take those grievances
10 to arbitration because, you know, we don't think you really
11 deserve it, something like that. They're not alleging
12 anything like that.

13 They're saying that these acts of alleged
14 discrimination that occurred before it are there were fires
15 three years ago. Someone got their hand hurt three years
16 ago. Those aren't discrete acts of discrimination. They're
17 not claims of discrimination at all. They're claims that
18 something bad happened to these employees and the union I
19 guess their claim is should have done something about it and
20 then did something.

21 I suggest they don't even fall within the statement
22 in Morgan that you can use discrete acts of discrimination
23 outside of the statute of limitations as evidence because
24 it's not evidence of discrimination.

25 Thank you.

1 **MR. BERGER:** It's fair to say that this
2 (indicating) is the amount of documentary evidence that's in
3 the case. It's going to be a long trial. I completely
4 disagree with my brother on what he said.

5 And what I think the SJC, the Supreme Court is very
6 clearly saying is that we can't completely sever relevant
7 evidence about a pattern in a plant. We have to take what
8 information can prove the evidence of the case as it comes
9 in.

10 And I think that the decision could hardly be
11 clearer. I mean, it was a little surprising that it went
12 this pro plaintiff. And I think that any motion in limine
13 would be premature. Clearly it depends on what the evidence
14 is.

15 And our main witness, of course, is the union's
16 representative who had knowledge of many things and didn't
17 do anything. So it's really going to depend.

18 **THE COURT:** Okay. I will take that under
19 advisement. I will deal with all these motions in one
20 order.

21 The same is true with the motion in limine to
22 preclude unspecific testimony.

23 Now, I take it that you are going to -- can't you
24 simplify the case by just eliminating the --

25 **MR. BERGER:** The DFR stuff --

1 **THE COURT:** -- state law discrimination
2 claims?

3 **MR. BERGER:** No, because of an interesting
4 problem. The cap on damages under the federal law is
5 \$800,000. There is no cap on damages under 151(b). So this
6 is a God awful case for the plaintiff or I mean a great case
7 for the plaintiff.

8 **THE COURT:** What about the contention that
9 there is a preemption here?

10 **MR. BERGER:** Well, that was already addressed
11 in your summary judgment papers. And I consider it to be a
12 very weak argument as I think summary judgment resolution
13 pointed out because this is not the kind of case where there
14 is one in preemption.

15 **THE COURT:** I am going to take that --

16 **MR. BERGER:** Okay.

17 **THE COURT:** I am going to reconsider that and
18 we will see.

19 Since you waved that pile of documents and have put
20 fear in my heart as to what kind of case this is going to
21 be, what is the chance of my getting you to settle this
22 case?

23 **MR. BERGER:** That's a -- if I could just back
24 up for one minute.

25 On the motion to attach, if I could just focus on

1 that for one minute because it has to do with the
2 settlement.

3 What happened was there were some confusion. I had
4 filed two affidavits (indicating) in this case -- the one
5 thing I do know about is collection law -- that I referred
6 to in my motion to attach under Rule 64.

7 Rule 64 says at any time you can move for an
8 attachment. This is the classic scenario of a motion for an
9 attachment.

10 Now, the motion that was allowed here was to strike
11 our submission because there was no affidavit. There was an
12 affidavit and it was in the papers. And I have practiced
13 for almost thirty years. The affidavit was in the
14 papers and was --

15 **THE COURT:** Well, let's assume that I am not
16 penalizing you because there was no affidavit. But it is
17 that whatever was submitted -- give me a second.

18 (Pause in proceedings.)

19 **THE COURT:** The evaluation --

20 **MR. BERGER:** Yes.

21 **THE COURT:** Everything that has been submitted
22 does not constitute an evaluation that poses danger that
23 there is going to be a verdict here of 65 million dollars or
24 whatever it is and there won't be any money to pay.

25 **MR. BERGER:** There are some indicia. First

1 off, what we went through in 17 pages of detailed evidence,
2 evidence, not my comments, was the information from the
3 transcripts and the documentary evidence which is part of
4 the case now. That's been ruled on by the Court.

5 In that 17 pages of evidence we also included an
6 assessment of damages based on their testimony. And here is
7 why it is critical to the scenario that we are dealing with
8 in terms of resolving this dispute.

9 I think it is an understatement to say that what
10 this case is about is the union ignoring these people. And
11 so what we tried to do, apparently awkwardly by referring to
12 affidavits that were already in the file -- and then I
13 couldn't believe it. They filed a motion to strike it when,
14 knowing that these affidavits were in the file but they, you
15 know, it was clever.

16 But here's what we're dealing with is an assessment
17 of damages where each plaintiff has lost wages -- these are
18 poor people -- maybe \$60,000. Future wages, maybe \$150,000.
19 We don't have to worry about tax because these aren't
20 taxable people because their income is too low.

21 Emotional distress, 400,000. I have myself in a
22 case called Thomasi (ph.) versus Commonwealth gotten an
23 assessment of emotional damages of \$800,000. So that's not
24 crazy because I have done it.

25 Punitive damages, 200,000. That's under the

1 federal bar. That equals \$810,000 for the five unemployed
2 plaintiffs for damages of five million fifty thousand. The
3 unemployable ones, the ones who passed their peak years,
4 each plaintiff, there are seven of those. Lost wages,
5 again, \$60,000. Not a big item. Future wages, \$175,000.
6 Emotional distress, again, 400,000.

7 Now, this was a complete sweat shop. People
8 were -- there was fire going on while the union was there.
9 What was going on -- it was upholstery workers and there
10 were burning fires going on. There was one man who talks
11 about spitting up blood constantly.

12 There were people who had their fingers cut off.
13 The machinery was a hundred years old.

14 And bear in mind that in the lead case in the
15 United States, United States versus Lukens (ph.), it
16 involved the same union, the same conduct. So this is
17 nothing new. In fact, if you go through the history of this
18 union, you will see that they have been attacked for their
19 safety issues in mills, whether the mills are like this one
20 which is just a sweat shop for upholstery workers or whether
21 it is mine workers. This a far-reaching case.

22 Let me go through the emotional distress where
23 people are living in a sweat shop. 400,000 for the seven,
24 200,000 punitive, for a total there of 835. So seven times
25 that is 584,000.

1 Now, the mix. That goes 40, 120, 400, 200, 760,
2 the three million eight hundred for a grand total of
3 \$13,695,000.

4 Now, we went through the attachment under 151(b) to
5 get the attention of these people. If you would have your
6 clerks do a search in the Internet of the number of times
7 the United Steelworkers have been sued for safety
8 violations, my suggestion is it's going to be in the
9 hundreds. And nobody, nobody has called them to task.
10 Nobody. That's why we filed the attachment. And then it's
11 off on some procedural thing which doesn't even exist.

12 The affidavits are here (indicating). We
13 painfully --

14 **THE COURT:** What does this all have to do with
15 your willingness to try to settle the case? I thought that
16 was my question.

17 **MR. DIAZ:** Let me address the question, Your
18 Honor. Good morning.

19 I have spoken to all the individuals. I have had
20 two individuals, Jose Ramirez and Jose Ortiz, on call.
21 They're more than willing to bring it to the table, discuss
22 it. They have given me a number they have in mind. I'd be
23 more than happy to talk to my brother here --

24 **THE COURT:** No, have you had any conversation
25 about settling the case?

1 **MR. DIAZ:** I contacted them. I think one of
2 the concerns -- and I'm sure that they're going to address
3 it -- is they don't necessarily want to resolve the case
4 that may open up a Pandora's box to other people making
5 claims. I told them we would be more than happy to have a
6 confidentiality agreement. Anything that happens here stays
7 here. You know, we are more than willing to discuss that.

8 I'll let my brothers address it.

9 **THE COURT:** Well, has there been any --
10 everybody keeps popping up here.

11 **MR. BERGER:** There was a one-day mediation,
12 federal mediation. That was before the summary judgment.

13 **THE COURT:** That was with Magistrate Dein?

14 **MR. BERGER:** That's right. And the whole
15 thing was what would happen on summary judgment and we won.

16 **MR. DIAZ:** The bottom line, Judge, is there
17 has been no further -- other than inquiry from time to time,
18 there has been no settlement discussion.

19 **THE COURT:** All right. Now, you guys sit down
20 at the front table. No more popping up.

21 The defendants, is there any interest in trying to
22 settle this case?

23 **MR. LICHTEN:** I have spoken to the general
24 counsel for the steelworkers. And it is hard for the
25 steelworkers to make an offer because it's still not clear

1 what it did wrong and doesn't believe that there is anything
2 that legally could support any type of verdict.

3 However, they're willing to make a nominal offer
4 of, you know, a couple thousand dollars per individual and
5 some modest amount of attorneys' fees. But that's where
6 they're at.

7 **THE COURT:** Okay. So what I have to do is to
8 just revisit these motions that are pending, decide them and
9 then give you a trial date.

10 **MR. BERGER:** And may I request that you
11 revisit the motion to attach?

12 **THE COURT:** Yes.

13 **MR. BERGER:** With the knowledge that the
14 affidavits are in the file.

15 **THE COURT:** Yes.

16 **MR. BERGER:** Thank you.

17 **MR. LICHTEN:** Your Honor.

18 (Whereupon, the Court and the Clerk conferred.)

19 **THE COURT:** Zita reminds me that we are going
20 to take care of all this last-minute business so we probably
21 won't be able to meet the March 20 trial date.

22 You are going to come up with a new complaint for
23 us to get in mind exactly what we -- they have to have an
24 opportunity to respond to the amended complaint. I want to
25 deal with these motions.

1 So what we will do is kick ahead -- we will excuse
2 you from the March 20th trial date, which is not -- this is
3 a fairly new case so that is not so bad.

4 And at the time that I issue an order with respect
5 to the motions that I am going to take under advisement
6 again we will give you a date to return for a further final
7 conference and set a trial date that is convenient for
8 everybody not too far in advance of the conference.

9 Does that seem okay?

10 **MR. BERGER:** Yes.

11 TRE COURT: So you are going to file your
12 amended complaint. How much time do you need to respond to
13 the amended complaint so we are dealing with a --

14 **MR. LICHTEN:** Just perhaps two weeks, Your
15 Honor.

16 **THE COURT:** All right, two weeks to respond.

17 **MR. ROBERTS:** Your Honor, if I may?

18 TRE COURT: Yes.

19 **MR. ROBERTS:** Based on the fact that
20 Mr. Berger will be redrafting the complaint, I wonder if it
21 makes sense to issue some sort of nisi order regarding
22 Farnsworth Fibre and Sherman-Feinberg in that it sounds like
23 they won't be part of the new matter.

24 **MR. BERGER:** Your Honor, when I do the
25 drafting, I'm just going to amend them out. But I haven't

1 done the drafting yet. I make that representation.

2 TRE COURT: All right.

3 MR. LICHTEN: Well, Your Honor, we may cross
4 claim against them. Some of the issues raised by my brother
5 counsel about back pay and front pay, the plant closed and
6 went bankrupt. There is no such thing as a front pay claim
7 or a back pay claim that the union would be responsible for.
8 We cited this to you in our responsive motion for
9 attachment.

10 If there is anything like a back pay or a front pay
11 obligation, it would have to be the responsibility, if any,
12 of the employer because the union can't stop a plant from
13 closing.

14 THE COURT: You haven't made a direct case
15 against them I take it.

16 MR. LICHTEN: Well, they're in the case right
17 now. They're a joint defendant right now so.

18 THE COURT: He is going to let them out.

19 MR. LICHTEN: What?

20 THE COURT: He is going to let them out.

21 MR. LICHTEN: All I'm saying is I want to
22 apprise the Court that we may then file a cross claim
23 against them.

24 THE COURT: All right. You have got two weeks
25 after he files his complaint. You do whatever you want.

1 **MR. LICHTEN:** Thank you.

2 With respect to some of the comments made about the
3 motion to attach, we fully addressed this in our brief but I
4 would like to address some of the points that were made.

5 **THE COURT:** Go ahead.

6 **MR. LICHTEN:** Very briefly, Your Honor, the
7 reason we moved to strike was not necessarily because there
8 were no affidavits. We understand he's contending there
9 were other affidavits they had filed. It's because we cited
10 clear law that attorney affidavits may not suffice as a
11 matter of law. And he cited you First Circuit and district
12 court precedent, that an attorney's affidavit cannot
13 constitute a showing of a reasonable likelihood of success
14 on the merits. And that law I submit is clear.

15 Secondly, this 17 pages of evidence is just
16 testimony of witnesses to the effect that there were fires,
17 there was smoke, I hurt my finger. Nothing saying that this~
18 was discriminatory. There was no evidence, not one shred of
19 evidence that anything the steelworkers did or did not do
20 was the result of discrimination.

21 In fact, the international rep that they're
22 complaining about is himself black and his assistant was
23 Puerto Rican. So there is no evidence of discrimination.

24 Now they just announced that they're doing away
25 with the DFR claim. So all this stuff about safety

1 violations and all that, those are DFR violations. They're
2 not discrimination without some showing that the actions
3 taken was because of discrimination.

4 Now, here's the interesting thing. They just
5 accused us of doing this all over the country. First of
6 all, the U.S. Supreme Court held in the Rawson case, 495
7 U.S. 362, that a union has no responsibility for ensuring
8 safety. That's for OSHA. That's for the employer and the
9 Worker's Comp. There is no generalized duty of a union to
10 ensure safety. And that's U.S. Supreme Court precedent.

11 But let's assume he is correct. If we've done this
12 all over the country in mines where there are all these
13 white workers, then how could we be guilty of discrimination
14 if we generally don't take care of safety violations,
15 because they just announced that they're dropping their DFR
16 claim. So how could they possibly get an attachment for 65
17 million dollars saying that this is a pattern of treating
18 minorities and whites equally across the country.

19 It doesn't make any sense, Your Honor. It's
20 illogical. And it borders on the absurd.

21 Finally, Your Honor, and I'd like to address this,
22 with respect to these damage calculations of front pay and
23 back pay, again, what is absolutely not disputed in this
24 case is this employer -- arguably it was an old mattress
25 stuffing plant in Boston with outdated machinery. There is

1 no question. And they closed, they closed their doors. And
2 they have never been heard of again. They don't even exist
3 any more.

4 That's unfortunate but it's hard to understand how
5 in a motion for attachment they could claim front pay and
6 back pay because even if we didn't bargain some severance
7 pay for these individuals, that would be the extent of their
8 damages -- and we briefed this in the motion to attach --
9 there would be a couple of weeks of severance pay.

10 How could there be front pay? How could -- the
11 union has no obligation and no lawful way that they could
12 prevent a plant closing.

13 The U.S. Supreme Court has decided in the National
14 Labor Relations Board context that a union can't prevent a
15 plant from closing. The only duty to bargain that the
16 employer had is to bargain over the effects of the closure,
17 which the union did by the way, but it has no right to even
18 bargain over the decision to close.

19 So how can there be front pay and back pay as a
20 matter of law when we couldn't prevent the plant from
21 closing. And they got paid everything, the workers got paid
22 everything. They've been paid their health insurance, their
23 pension, their wages up until the plant closure. It doesn't
24 make any sense, Your Honor.

25 **THE COURT:** Okay.

1 **MR. BERGER:** Your Honor, it is true that I
2 submitted an affidavit. It annexes all of the deposition
3 transcripts of the case. It doesn't reflect any of my
4 opinions about the case whatsoever, although that was what
5 was represented in the papers.

6 And in the other affidavit it annexes the
7 documentary evidence in the case, every piece of it. None
8 of my opinions in it. For them to say that I have put an
9 opinion as an attorney in it, which they said, is just not
10 correct.

11 **THE COURT:** All right. We will take it all
12 under advisement. Thank you very much.

13 **MR. BERGER:** Thank you, Your Honor.

14 **MR. DIAZ:** Thank you, Your Honor.

15 **MR. LICHTEN:** Thank you, Your Honor.

16 **MR. ROBERTS:** Thank you, Your Honor.

17

18 (WHEREUPON, the proceedings were recessed at 11:05
19 a.m.)

20

21

22

23

24

25

CERTIFICATE

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

CAROL LYNN SCOTT Official Court Reporter John J. Moakley Courthouse 1
Courthouse Way, Suite 7204 Boston, Massachusetts 02210

(617) 330-1377